UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity As Court-Appointed Receiver For The Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities

Plaintiff,

vs.

ASSOCIATED BANK, N.A.,

Defendant.

Case No. 13-cv-00232 (DSD-JSM)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS REGARDING IN PARI DELICTO AND RES JUDICATA

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INTRODUCTION

Pursuant to this Court's Pretrial Scheduling Order (Phase I), dated April 13, 2015 [ECF No. 67], reproduced below are those portions of Defendant Associated Bank, N.A.'s previously filed Memorandum of Law in Support of Defendant's Motion to Dismiss [ECF No. 30] that address its *res judicata* and *in pari delicto* defenses.

* * *

Trevor Cook, Patrick Kiley, and others perpetrated a Ponzi scheme that defrauded investors of millions of dollars (the "Cook/Kiley fraud"). Cook and Kiley have since been convicted and incarcerated. Chief Judge Davis appointed R.J. Zayed as Receiver to marshal the investors' assets and to repay them. *SEC v. Cook*, 9-cv-3333 (D. Minn.) [Doc. 13]. The Receiver's status reports indicate that, primarily through claw-back actions, he has recovered millions of dollars for the investors. *Id.* [Doc. 1033]. These are laudable efforts.

But the current suit—in which the Receiver sets his sights on Associated Bank ("Associated")—is an entirely different animal. The Receiver is overreaching his legal authority. This suit asserts claims that the Receiver is not permitted to pursue, obstructs the rights of the very persons whom the Receiver seeks to benefit, rests on allegations insufficient to state a claim, and, if permitted to go forward, would interfere with Minnesota law designed to

ensure that the public enjoys a reliable, smoothly-functioning banking system.

It bears emphasis that this is not the first time that plaintiffs have sued Associated for the Cook/Kiley fraud. A group of investors sued Associated in Wisconsin state court on aiding and abetting claims identical to two of those the Receiver asserts here; the court dismissed the action, and the dismissal was affirmed on appeal. *See Grad v. Associated Bank N.A.*, 801 N.W.2d 349 (table), 2011 WL 2184335 (Wis. Ct. App. 2011). Another group of investors sued Associated in this Court but voluntarily dismissed their claims. These prior cases illustrate that not only are the investors capable of suing Associated, they are the correct parties to do so. By contrast, the Receiver, who stands "in the shoes" of Cook, Kiley, and their sham companies, cannot sue Associated under the *in pari delicto* doctrine that bars fraudsters from suing others for allegedly aiding and abetting their own wrongdoing. And even if the Receiver did not stand in the shoes of the fraudsters, but rather could assert the claims of the investors, his claims would be barred by *res judicata*, as some investors already sued (and lost) in Wisconsin. What is more, the Receiver lacks prudential standing to pursue this matter. That doctrine prevents suits, such as this one, in which the plaintiffs' rights are derivative of the rights of other parties who themselves would be the more effective and appropriate advocates of the rights at issue.

All of these doctrines discussed above reflect a common theme. Only the proper party (*i.e.*, the investors, and not the Receiver) may bring this suit. That is not just Minnesota law, it is also good policy. The investors, as the injured parties, are best positioned to determine whether to sue Associated (yet again), and on what terms litigation should be resolved.

Rejecting claims like the Receiver's, which seek to impose liability in hindsight for routine banking transactions, is essential for several reasons. One, permitting such claims would chill banking activity. *See Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 189 (Minn. 1999) ("[i]f we were to recognize that such routine services" are sufficient to permit an aiding and abetting claim, "then it would be the rare [professional] indeed who would not be subject to automatic liability merely because his client happened to be a tortfeasor"). Two, allowing such claims would impose "near-strict liability for the torts of [a bank's] clients," leading to "a devastating impact on commercial relationships." *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 908 (W.D. Mich. 2010). In Minnesota, the commercial relationship between bank and customer requires a bank to, among other things, afford its customers prompt access to funds on deposit. If banks were liable in a situation like this, it would impose new, time-intensive duties on banks to police their customer's transactions, interfering with Minnesota's carefully considered policy.

BACKGROUND

A. Associated Bank.

Associated Bank is a federally-chartered national banking association headquartered in Green Bay, Wisconsin. Founded in 1970, with many of its offices tracing their roots to the 1880s and 1890s, Associated offers banking and financial services throughout Wisconsin, Illinois, and Minnesota. Associated has over 25 branches in Minnesota.

B. The Cook/Kiley fraud.

The Cook/Kiley fraud began in mid-2005. *See* Compl. ¶ 8, *R.J. Zayed v. Peregrine Financial Corp.*, 12-cv-00269 (D. Minn.) [Doc. 1]. Oxford Global Partners, LLC, Universal Brokerage, FX, Crown Forex LLC and other related entities (the "Receivership Entities") maintained accounts, allegedly used in furtherance of the Cook/Kiley fraud, at several leading financial institutions, including Wells Fargo, Charles Schwab, Saxo Bank, Credit Suisse, and PFG Best. *See* Compl. Ex. 12 ¶¶ 5, 48; *SEC v. Cook*, 9-cv-3333 (D. Minn.) [Doc. 100]. In 2008, the Receivership Entities for the first time opened accounts at Associated. Compl. ¶ 29. In summer 2009, the Cook/Kiley fraud came to light and collapsed. *Id.* Ex. 12 ¶ 17; *id.* Ex. 25 ¶ 35.

At the heart of the Complaint are allegations that Associated should have spotted certain red flags, investigated further, and ultimately stopped the Ponzi scheme: "Had Associated Bank investigated any of the numerous

red flags it had before it as raised by several employees, Associated Bank would have uncovered the Ponzi scheme and prevented it from flourishing." Compl. ¶ 74.

Although (1) Trevor Cook—one of the architects of the Cook/Kiley fraud whose plea agreement obligates him to cooperate with the Receiver—has been deposed, (2) Christopher Pettengill, another of the convicted fraudsters, has provided the Receiver with an affidavit for use in this action (Compl. Ex. 20), and (3) other principals of the Cook/Kiley fraud have testified in court, either for the prosecution or in their own defense, the Receiver does not allege that any witness asserts that Associated was aware of the Cook/Kiley fraud. To the contrary, in the small excerpt of the Cook deposition that the Receiver appends to his Complaint, Cook testifies: "I don't think [Associated employee Sarles] thought there was anything wrong. … I don't think he thought there was a fraud going on." *Id.* Ex. 3, at 1764. The Receiver also appends to his Complaint a Sarles affidavit; that testimony similarly confirms a lack of knowledge. *See id.* Ex. 4 ¶ 29.

Nevertheless, the Receiver argues that Associated's knowledge may be "inferred" from what the Receiver characterizes as "circumstantial evidence." *See, e.g.*, Compl. ¶ 13. The "circumstances" on which the Receiver relies are: that Associated knew that certain accounts were to hold investor funds (*id.* ¶¶ 10, 29, 31, 39, 45, 55, 60, 72(B), 72(I), 72(N), 72(AA), 72(FF)); that Kiley

was a financial advisor who was operating his business out of a house rather than an office (*id.* ¶¶ 35, 40, 43, 72(A), 72(G)); that Minnesota registration had not yet been obtained or provided for Crown Forex LLC (*id.* ¶¶ 6, 42, 61, 72(K), 72(M), 72(S), 72(Z))); that in July 2009, the Ponzi scheme principals were under investigation (*id.* ¶¶ 66, 72(BB)); that an Associated employee knew that Cook was transferring money from the Crown Forex LLC account into his personal account (*id.* ¶¶ 10, 45); that Associated prepared checks knowing the remitter for the check was Crown Forex LLC (*id.* ¶ 64); that the principals were attempting to deposit checks payable to Crown or Basel entities (*id.* ¶ 67); and that funds were not being transferred to Crown Forex, SA (*id.* ¶ 46).

C. Prior proceedings.

In 2009, some investors sued Associated in Wisconsin. *See Grad v. Associated Bank, N.A.*, 09-cv-2949 (Wis. Cir. Ct.). They asserted claims for negligence, aiding and abetting breach of fiduciary duty, and aiding and abetting conversion. Like here, plaintiffs alleged that "Associated Bank ignored obvious red flags symptomatic of fraud or other illicit activity." *Grad* Compl. ¶ 3, App. 2.[1] They alleged largely the same supposed red flags as here, *e.g.,* Minnesota registration had not yet been obtained for Crown Forex LLC (Grad *id.*

[1] All citations to "App." are to the Appendix to Associated Bank, N.A.'s Memorandum of Law in Support of its Motion to Dismiss [ECF No. 31].

¶¶ 50-51, App. 12), Kiley's background was inconsistent with the sophistication of the products he sold (*id.* ¶ 54, App. 13). On April 8, 2010, the trial court dismissed the Complaint. App. 25. On June 7, 2011, the Wisconsin Court of Appeals affirmed the dismissal. *Grad*, 801 N.W.2d 349.

On November 4, 2009, a group of over fifty individual plaintiffs named Associated as a defendant in *Phillips v. Cook*, 0:09-cv-01732-MJD-JJK (D. Minn.). They asserted a negligence claim against Associated based on allegations that Associated "failed to recognize and investigate 'red flags' and indicia of fraud." *Phillips* Am. Compl. ¶ 1,605 [Doc. 197]. On December 9, 2009—the day before Associated's motion to dismiss was due—plaintiffs voluntarily dismissed their claims against Associated.

ARGUMENT

Because the Receiver "stands" in the "shoes" of the Receivership Entities, he may assert claims those entities possess, such as a claim to claw back fraudulent transfers to outside parties. *Kelley v. Coll. of St. Benedict*, 2012 WL 5309501, at *3 (D. Minn. 2012). This is the traditional and proper role of an equity receiver.

Here, however, the Receiver seeks to do something drastically different: he has sued Associated for allegedly aiding the very fraudsters in whose shoes he now stands. To do so, the Receiver asserts an "injury" that is really the investors' injury. As the Receiver explains it, the injury is that the Re-

ceivership Entities "now owe the defrauded creditors" for the Receivership Entities' own wrongdoing. Compl. ¶¶ 83, 88, 94, 98.[2]

This artifice is impermissible. For multiple reasons, the individual investors, not the Receiver, must bring any claims against Associated.

I. The *in pari delicto* doctrine bars this action.

"The doctrine of *in pari delicto* is the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 837 (8th Cir. 2005) (quotation omitted). The doctrine "is an affirmative defense," "but dismissal under Rule 12(b)(6) may be proper if the face of the complaint establishes the requirements of the defense." *Peterson v. Winston & Strawn, LLP*, 2012 WL 4892758, at *3 (N.D. Ill. 2012). Here, the Complaint establishes the defense.

The *in pari delicto* defense "operates to prevent wrongdoers at equal fault from recovering against one another." *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 814 (Minn. Ct. App. 2007). It applies "to tortious transactions based upon fraud or similar intentional wrongdoing," as "[g]enerally, anyone who engages in a fraudulent scheme forfeits all right to

[2] The Receiver, however, does not plead that any Receivership Entity has yet been found to owe money, and thus the claim has not ripened. If he cannot show a "final judgment or payment of a judgment," this action, which is effectively a "claim for contribution" would not be "ripe for adjudication." *Schaffner v. Crown Equip. Corp.*, 2012 WL 70588, at *4 (N.D. Cal. 2012).

protection, either at law or in equity." *State by Head v. AAMCO Automatic Transmissions, Inc.*, 199 N.W.2d 444, 448 (Minn. 1972) (quotation omitted); *see also F&H Inv. Co. v. Sackman-Gilliland Corp.*, 728 F.2d 1050, 1054 (8th Cir. 1984). This stems from the rule that "[a]n intentional tortfeasor is prohibited from seeking contribution from other joint tortfeasors." *Oelschlager v. Magnuson*, 528 N.W.2d 895, 899 (Minn. Ct. App. 1995).

Christians is particularly instructive. A corporation's bankruptcy trustee (a position akin to the Receiver) brought claims against an auditor. *Christians*, 733 N.W.2d at 807-08. The trustee asserted that the auditor's erroneous report caused the company injury. But it was the company itself that had failed to disclose material transactions to the auditor. *Id.* at 814. Even assuming the auditor had some liability, the court concluded that *in pari delicto* barred the trustee's claims because the company "bears at least substantially equal responsibility for the injury it seeks to remedy." *Id.* (quotation omitted). "[W]hen a defendant's only sin is its failure to prevent transgressions by the plaintiff, no benefit flows to the public from rewarding the transgressor." *Id.* at 815 (quotation omitted).

This case is no different; the Receivership Entities (via the Receiver) argue that Associated should have "uncovered and prevented the Ponzi scheme from flourishing" (Compl. ¶ 74), but they may not recover on the theory that Associated Bank failed to stop *them* from committing misconduct.

The appointment of the Receiver in this action does not alter the *in pari delicto* defense. *Christians* again controls. There, the trustee contended that the *in pari delicto* defense "should not apply to bankruptcy trustees as a matter of public policy because it would harm innocent creditors," but the court disagreed, holding that "courts regularly consider in pari delicto defenses and act to bar trustee claims on that basis despite the inevitable harm to creditors." 733 N.W.2d at 814. Because "[a] federal equity receiver is akin to a bankruptcy trustee" (*Kelley*, 2012 WL 5309501, at *3), *Christians* governs this case. This reflects the Minnesota rule that a receiver stands "in the shoes" of the receivership entities and thus is bound by any defenses that would apply to them. *Dickson v. Baker*, 77 N.W. 820, 821 (Minn. 1899).

Courts in other jurisdictions have dismissed materially identical suits by receivers on the ground of *in pari delicto*. For example, in *Knauer v. Jonathon Roberts Financial Group, Inc.*, 348 F.3d 230, 232 (7th Cir. 2003), a receiver sued broker-dealers that licensed Ponzi fraudsters as securities representatives. The Seventh Circuit affirmed dismissal, concluding that "[t]he doctrine of *in pari delicto* … applies to defeat the receiver's claims." *Id.* at 238.[3]

[3] *Knauer* distinguished an earlier decision, *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995), which stated that "the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Knauer* held that *Scholes* is limited to receivers' claims for fraudulent conveyance—a tra-

Similarly, in *Myatt v. RHBT Financial Corp.*, 635 S.E.2d 545, 548 (S.C. Ct. App. 2006), the court affirmed summary judgment in favor of a bank in circumstances nearly identical to this suit. A federally-appointed receiver alleged that the bank aided and abetted a fraudster who operated an illegitimate investment scheme. *Id.* at 546-47. Because the receiver "was seeking tort damages from the Bank for its actions regarding the accounts" instead of "seeking to recover diverted funds from the Bank," the court concluded that "the receiver of a corporation used to perpetuate fraud may not seek recovery against an alleged third-party co-conspirator in the fraud." *Id.* at 548.

And in *Hays v. Pearlman*, 2010 WL 4510956, at *5-7 (D.S.C. 2010), the court dismissed, on the basis of *in pari delicto*, a receiver's claims against a lawyer who allegedly aided a Ponzi fraudster.

In other litigation, the Receiver pointed to certain Minnesota cases for the proposition that *in pari delicto* is not a bar to a receiver pursuing a claim for fraudulent conveyance. *See* Pl.'s Mem. of Law in Opp. to PFG's Mot. to Transfer Venue, at 8 n.3, *Zayed v. Peregrine Financial Group*, No. 12-cv-269 (D. Minn.) [Doc. 21] (citing *German-Am. Fin. Corp. v. Merchs.' & Mfrs.' State*

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ditional receivership function. *Knauer*, 348 F.3d at 236. The court emphasized that *Scholes* does not reach "a claim for tort damages from entities that derived no benefit from the embezzlements, but that were allegedly partly to blame for their occurrence." *Id.* Moreover, the Seventh Circuit later confirmed that *Scholes*'s statement about the *in pari delicto* defense "is dictum [because] *Scholes* did not entail a *pari delicto* defense." *Peterson v. McGladrey & Pullen, LLP*, 676 F.3d 594, 599 (7th Cir. 2012).

Bank, 225 N.W. 891 (Minn. 1929); *Magnusson v. Am. Allied Ins. Co.*, 189 N.W.2d 28 (Minn. 1971); *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976)). But that precedent is not relevant here.

German-American Financial Corp. is limited to the fraudulent conveyance context, and *Bonhiver* and *Magnusson* apply to a different type of receiver with powers that a federal equity receiver cannot invoke. The "receiver" at issue in those cases was a liquidator—a unique creature of statute, appointed by the state commissioner of insurance, who stood in the shoes of the creditors. *Bonhiver*, 248 N.W.2d at 296; *Schacht v. Brown*, 711 F.2d 1343, 1346 n.3 (7th Cir. 1983) (in *Bonhiver*, state law "authorized the liquidator to assert claims of creditors"); *Reider v. Arthur Andersen, LLP*, 784 A.2d 464, 479-80 (Conn. Super. Ct. 2001) (same). Because the receiver was not asserting the corporation's claims, he was "not bound by the fraudulent acts of a former officer of the corporation." *Bonhiver*, 248 N.W.2d at 296.

This case, however, involves a federal receiver, who "may sue only on behalf of the entity (or person) in receivership, not third parties." *Kelley*, 2012 WL 5309501, at *3. The Receiver here, therefore, cannot avoid *in pari delicto* by stepping into the shoes of the creditors. *Christians*, which expressly

contemplated *Bonhiver* (733 N.W.2d at 810), demonstrates that *in pari delicto* applies here.[4]

II. *Res judicata* bars the Receiver's claims.

If, however, the Receiver somehow could step into the shoes of the creditors in order to avoid the *in pari delicto* doctrine, then *res judicata* would bar this suit. Some of the investors sued Associated in Wisconsin and lost. If the Receiver represents their rights, he cannot pursue this action. To the extent that the other investors (who were not present in Wisconsin) wish to press a claim, they may do so in their own name. Otherwise, the Receiver and individual investors who sued in Wisconsin could take multiple bites at the same apple.

Res judicata precludes "a subsequent lawsuit on the same cause of action as to matters actually litigated and as to other claims or defenses that could have been litigated." *SMA Servs., Inc. v. Weaver*, 632 N.W.2d 770, 773 (Minn. Ct. App. 2001). There are three requirements: (1) "there was a final judgment on the merits," (2) "a second suit involves the same cause of action," and (3) "the parties to both were identical or were in privity with identical parties." *Id.*

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[4] If there is any doubt as to Minnesota law, this question may warrant certification to the Minnesota Supreme Court. *See* Minn. Stat. § 480.065(3); *Reiland v. Sullivan*, 2008 WL 2080974 (D. Minn. 2008).

Here, the Wisconsin lawsuit was dismissed with prejudice on the merits. *See* Revised Order, App. 25. And *Grad* involved the same claims against Associated, *i.e.*, that Associated "aided and abetted" the Receivership Entities' "breach of a fiduciary duty to [the investors] and conversion of [the investors'] property." *Grad*, 801 N.W.2d 349, at *1. Moreover, the *Grad* plaintiffs "could have" litigated these claims in Wisconsin. *SMA Servs.,* 632 N.W.2d at 773.

If the Receiver represents the rights of creditors, then he is in privity with the *Grad* plaintiffs. *See Lamson v. Towle-Jamieson Inv. Co.*, 245 N.W. 627, 628 (Minn. 1932). "Privity does not follow one specific definition, but rather expresses the idea that a judgment should also determine the interests of certain non-parties closely connected with the litigation." *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1998).

In *Lamson*, a corporation's receiver sued for the value of a farm, and the defendants prevailed. 245 N.W. at 628. Later, an individual creditor of the corporation sued the same defendants seeking the same relief. *Id.* at 627. That creditor, the court concluded, was in privity with the receiver, who acted for his benefit. *Id.* at 628. And those "in privity with an unsuccessful litigant are as much bound by the judgment finally defeating him as is the litigant himself." *Id.*; *see also Javitch v. Gottfried*, 2007 WL 81857 (N.D. Ohio 2007) (settlement by investors in a fraudulent investment scheme barred subse-

quent claim by a receiver); *Britt v. Vernon*, 2006 WL 2843626 (E.D. Cal. 2006) (receiver's settlement precluded a claim by a creditor against the same defendant).

Barring this action pursuant to *res judicata* is not unfair to the other investors; if they wish to sue Associated, they can do so in their own name. Indeed, other investors did so at one point. At bottom, if the Receiver is litigating on the investors' behalf, he cannot litigate a claim that the *Grad* plaintiffs have already lost.

III. The Receiver lacks standing.

Together, the preceding points demonstrate that the Receiver is not the proper litigant here. Instead, the individual investors should be the ones to sue. This provides yet another basis to dismiss.

"A party invoking federal jurisdiction must establish that he has met the requirements of both constitutional *and* prudential standing." *Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004) (emphasis added). Prudential standing provides "assurance that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978). Even if a "plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement" of Article III standing, the plaintiff cannot rely on injuries to third parties. *Id.* Prudential standing bars claims in which the "cause of action is founded on a duty owed

to a third party." 33 Charles Alan Wright & Charles H. Koch, Federal Practice & Procedure § 8413 (2012).

The prudential standing doctrine applies to exactly this type of suit. It is the *investors* who were defrauded by the Ponzi scheme, who were injured by any breach of fiduciary duty, and whose property was converted. So, even if the Receiver could bring this claim, prudential considerations demonstrate the he is not the proper litigant.

Permitting this suit to proceed with the Receiver representing investors, either *de jure* or *de facto*, would risk unfair and potentially adverse consequences. If the Receiver does litigate this case, it will likely have preclusive effect on the individual investors. *See*, *supra*, 14-15. Permitting the Receiver to proceed would, accordingly, violate the "deep rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (quotation omitted).

The Receiver's suit is particularly troubling as there is no means for investors to opt-out. In the class-action context, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class" through an opt-out mechanism. *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 812 (1985). Here, however, the Receiver—litigating as a volunteer—could bar individual investors from being masters of their own claims. It is the individuals who should decide whether to sue and how to re-

solve that litigation—just as several investors have already done. Moreover, it is the investors who should determine what to pay their lawyers for any recovery they receive, rather than have the Receiver dictate the terms of the representation. Win or lose, the Receiver will be paid from funds the Receiver has gathered for the investors. Accordingly, the investors, not the Receiver, should determine whether a suit against Associated is a wise investment of their assets.

CONCLUSION

The Court should dismiss the Complaint.

Dated: April 14, 2015

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